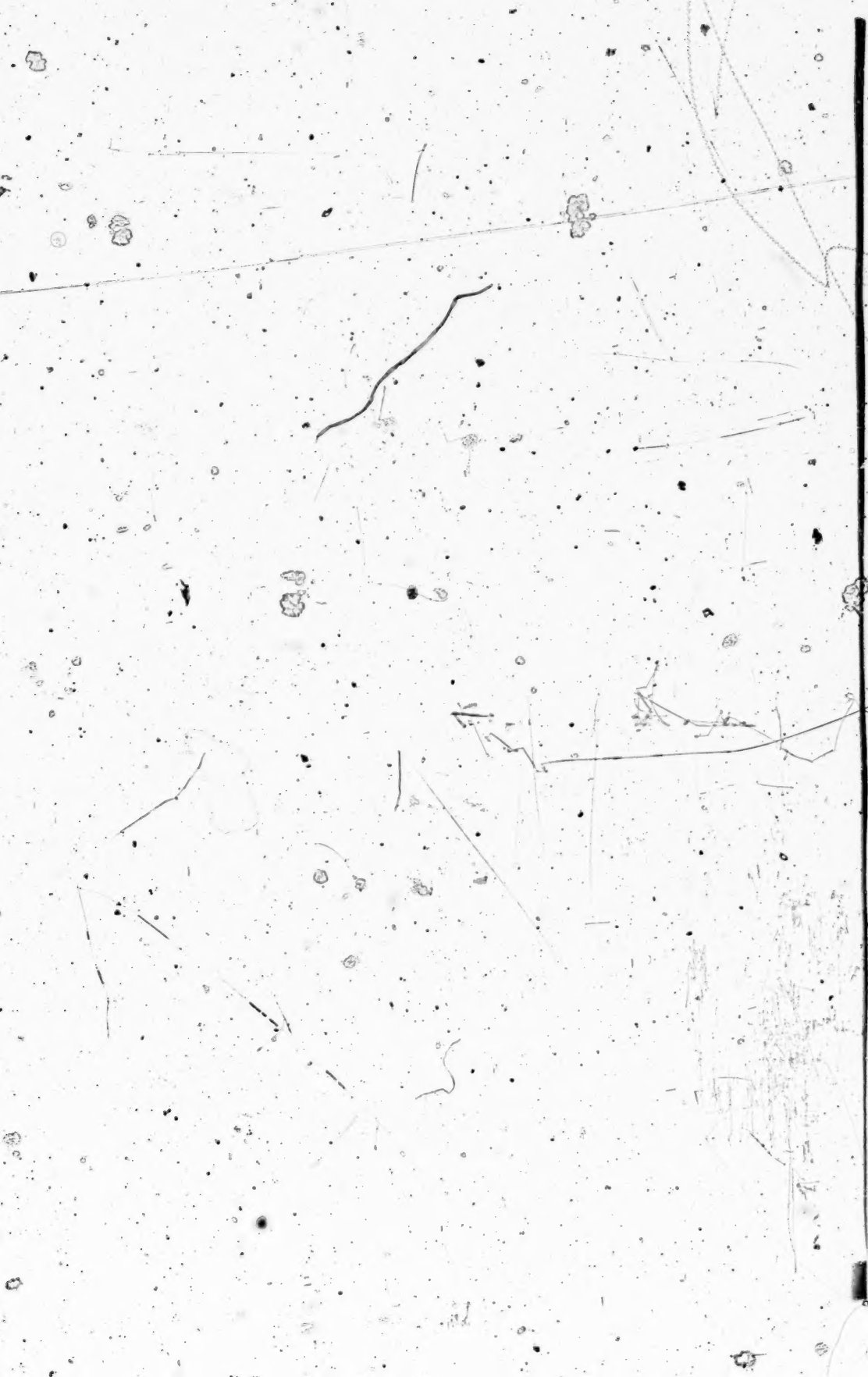

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Post Office Bldg.,
San Francisco, Calif.

In the District Court of the United States of America for the Northern District of California, Southern Division.

In the Examination of Matters Now Pending Before the Grand Jury in Session in the Northern District of California, Southern Division.

PETITION

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and respectfully prays that an order be entered directing the Clerk of this Court to issue subpoenas duces tecum, returnable November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the

time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit A. [1*]

And, subpoenas duces tecum returnable November 10, 1939, directed to the officers and directors of the corporations aforesaid, commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the grand jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit B.

FRANK J. HENNESSY
United States Attorney for the Northern District of California.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [2]

[Title of District Court and Cause.]

ORDER

On Petition of Frank J. Hennessy, United States Attorney for the Northern District of California, for Subpoenas in the above-entitled matter,

*Page numbering appearing at foot of page of original certified Transcript of Record.

It is hereby ordered that subpoenas duces tecum returnable on November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof,* be issued, as prayed for in said Petition; and,

It is further ordered that subpoenas duces tecum, [3] returnable November 10, 1939, directed to the officers and directors to bring and produce on be-

*Exhibit A

half of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof** be issued as prayed for in said Petition.

A. F. ST. SURE
United States District Judge.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [4]

[Title of District Court.]

SUBPOENA

The President of the United States of America

To A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California, Greeting:

You and each of you are hereby commanded, That all and singular business and excuses being laid aside, you and each of you, be and appear in your proper person before the United States District Court, for the Northern District of California, at the Court Room, in the City and County of San

**Exhibit B

Francisco, on the 10th day of November, A. D. 1939, at 10 o'clock in the forenoon, to Testify the Truth, and give evidence before the Grand Jury, and you are not to depart the Court without the leave of the Court or of the U. S. Attorney, and bring with you and produce at the time and place aforesaid:

All original letters, telegrams, correspondence, reports, memoranda, and other communications (or copies thereof where the originals are not in the possession of W. P. Fuller & Company) incoming or outgoing, exchanged by or passing, during the period from July 1, 1935 to date, between W. P. Fuller & Company, its officers, agents, or employees, and Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and relating to:

(a) The use, distribution, delivery, shipment, purchase, sale, or price of flat glass in the San Francisco Bay area.

(b) The importation of flat glass from foreign countries into the San Francisco Bay area, and the preparation of statistics in connection with such imports.

(c) The collection of statistics on the volume of business done by the larger persons, firms, and corporations engaged in the flat glass business in the San Francisco Bay area.

(d) The preparation and maintenance of a book or ledger containing a registry of flat glass jobs available in the San Francisco Bay area.

(e) Services performed by said Sam Goodman in checking prices bid on glass jobs by various bidders in the San Francisco Bay area.

(f) The protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

(g) The negotiation of agreements covering wages, hours, and working conditions between the Glass Jobbers' Association of San Francisco and Oakland and labor unions.

(h) Meetings between said Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and a representative or representatives of W. P. Fuller & Company, at which any of the subjects set forth in paragraphs numbered (a), (b), (c), (d), (e), (f), and (g) above were described.

And this you are not to omit, under pain of being adjudged guilty of a contempt of said Court.

Witness, the Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, and the seal of the said Court, this 2nd day of November, in the year of our Lord, one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[Seal] WALTER B. MALING,

Clerk.

By J. P. WELSH,

Deputy Clerk.

MARSHAL'S RETURN

I have served this writ personally by copy on A. H. Brawner, Officer and Director of W. P. Fuller & Company, at 301 Mission Street, San Francisco, Calif., this 3rd day of November, A. D. 1939.

GEORGE VICE,

U. S. Marshal.

By WARREN D. CAIN,

Deputy.

[Endorsed]: M. D. 46000 Crim. Received Nov. 2, 1939. U. S. Marshal's Office, San Francisco, Calif.

[Endorsed]: Filed Nov. 4, 1939.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 2679

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

ORDER SHORTENING TIME

Good cause being shown,

It is hereby ordered that service of the motion and notice [6] of motion to quash the subpoena duces tecum on file herein may be made by serving a copy of said motion and of this order upon Morris R. Clark, Esq., or upon any special assistant to the attorney general in his office, or upon the office of the United States Attorney for the Northern District of California, not later than 12 M. on the 8th day of November, 1939, at San Francisco, California, and the court hereby dispenses with other, further and different notice of the hearing of said motion.

It is further ordered that said motion shall be forthwith placed on the law and motion calendar

for hearing on Thursday, the 9th day of November, 1939, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: November 8, 1939.

A. F. ST. SURE,
United States District Judge.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [7]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM. [8]

To the United States of America and to James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States, its attorneys:

Please take notice that on Thursday, November 9, 1939, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, A. H. Brawner, individually and as officer and director of W. P. Fuller & Company, a California corporation, and W. P. Fuller & Company, a California corporation, will move the Honorable, the above entitled court in the courtroom of the Honorable A. F. St. Sure, Judge thereof, in the Post Office Building, San Francisco, California, for an order with reference to the above described subpoena (a copy of which

was handed to and left with said A. H. Brawner on or about November 3, 1939, and a copy of which is attached to the memorandum of points and authorities on file herein) as follows:

1. Quashing and vacating said subpoena;

2. Quashing and vacating the paragraph of said subpoena requiring the production of certain documents as purportedly described therein;

3. For such other and further relief as may be meet and proper in the premises.

Said motion will be made by the moving parties jointly and by each of them severally and will be made on the following grounds, severally and collectively:

1. Said subpoena duces tecum is oppressive, unreasonable and invalid because it does not call for documents but for information. The production of a document as purportedly called for by said subpoena would be tantamount to testimony that the document so produced passed between the parties described in said subpoena and related to the subjects enumerated therein; [9]

2. The enforcement of said subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself, contrary to the Fifth Amendment;

3. Said subpoena cannot compel the witness to go through a file of papers to ascertain which ones "relate to" matters stated therein;

4. Said subpoena is oppressive, unreasonable and invalid because there is no showing by said subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider;

5. Said subpoena is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate actions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the reach of any subpoena issued in connection with its investigations;

6. Enforcement of said subpoena for testimonial purposes without any showing of the materiality or evidentiary value of the documents sought to be produced, and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment;

7. The enforcement of such subpoena would result in taking the property of the moving parties without compensation and without due process of law, contrary to the Fifth Amendment.

Said motion will be based on all records and files of this court relating to the Grand Jury investigation in connection with which said subpoena duces tecum was issued, on this motion and notice of motion, on the memorandum of points and authorities [10] filed herewith and the copy of said subpoena at-

tached thereto, on the affidavit of A. H. Brawner filed herein, and upon such oral testimony and other evidence as the court may permit to be offered at the hearing herein.

Dated: San Francisco, California, November 7, 1939.

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for A. H. Brawner, individually and as Officer and Director of W. P. Fuller & Company, and for W. P. Fuller & Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF A. H. BRAWNER IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [12]

State of California,
City and County of San Francisco—ss.

A. H. Brawner, being duly sworn, deposes and says that he is an officer and director of W. P. Fuller & Company, with offices located at 301 Mission Street, San Francisco, California; that he is familiar with the operation of the business of said company, but that many of the letters, telegrams, correspondence, reports, memoranda, and other communications called for by the subpoena duces tecum issued under the seal of this court on November 2, 1939, directed to affiant, and returnable November 10, 1939, are not matters of which affiant has personal knowledge; and that a large part of the letters, telegrams, correspondence, reports, memoranda and other communications contained in the files of said W. P. Fuller & Company are not identified in such a way that it can be ascertained from the face thereof whether or not they constitute letters, telegrams, correspondence, reports, memoranda or other communications passing between W. P. Fuller & Company, its officers, agents, or employees and Sam Goodman, or relating to the matters enumerated in said subpoena.

Dated: San Francisco, California, November 7, 1939.

A. H. BRAWNER.

Subscribed and sworn to before me this 7th day of November, 1939.

FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [13]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [14]

(1). The subpoena duces tecum in the instant case is oppressive, unreasonable and invalid, because it does not call for documents but for information. The production of a document as called for by the subpoena would be tantamount to testimony that the document so produced passed between the parties described in the subpoena and related to the subjects therein enumerated.

A subpoena duces tecum is mechanical—not testimonial—in operation. It commands production of specific documents rather than the exercise of discretion or judgment by the witness. The witness' duty is to examine the subpoena and produce the very paper therein described.

"The duty of a witness under the writ as regulated by statute is simply to bring a specified paper to a designated place. Under a writ ad testificandum a party cannot make a man his lawyer, or physician, or scientific instructor by subpoenaing him as an * * * expert. Under neither writ is he entitled to the judgment, discretion, opinion or professional service of the witness."

Elting v. United States, 27 Ct. Cl. 158, 165.

The subpoena in the instant case does not describe any document with particularity but is obviously an attempt to determine whether any correspondence did pass between the parties described therein and to determine whether any of such correspondence, if it exists, relates to any of the special subjects enumerated therein. Essentially, what the subpoena calls for is information as to the existence of certain correspondence and the existence of certain factual situations. In other words, it seeks facts rather than documents.

"* * * the subpoena duces tecum is not proper to be used for the purpose of obtaining facts or information * * * or general inquisitorial examination of books * * * with a view to ascertaining whether something of value may not show up * * *."

70 C. J. 51, sec. 37. [15]

See, for example, as an illustration of the violation of this principle by the present subpoena,

subparagraph (f) thereof, requiring the production of correspondence relating to the protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

The Supreme Court of the United States, affirming refusal of a trial court to issue a subpoena duces tecum requiring the registrar of voters to furnish the number of white voters, of colored voters, and total number of voters who could sign their names, who had voted at the preceding congressional election, said:

> "The court was of opinion that either the defendant should have specified the books or documents required; or, *if he wished information* from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action."
>
> Murray v. Louisiana, 163 U. S. 101, 107.

(2) Using the subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself contrary to the Fifth Amendment.

There are, of course, authorities holding that a corporate officer cannot refuse to produce corporate records on the ground that they might tend to incriminate him personally. The situation contemplated by that rule is the production of documents

in response to a proper subpoena, in which the existence of the documents sought are known and the documents are described with particularity. The rule is not applicable to situations like the present one, in which the mere attempt to comply with the requirements of the subpoena would constitute testimony, that is, either [16] an affirmance or a denial of the existence of the documents sought and of their relevance to the particular subjects enumerated in the subpoena. The use of a subpoena for such testimonial purposes and in such a way that the party upon whom the subpoena was served has no opportunity to make claim of immunity constitutes in a very real sense the giving of testimony against himself in violation of his constitutional rights under the Fifth Amendment to the Constitution.

(3) A subpoena duces tecum cannot compel a witness to go through a file of papers to ascertain which ones "relate to" matters stated in the subpoena. Because this objection is very similar to the objection that a subpoena cannot be used for testimonial purposes, the case of Elting v. United States, 27 Ct. Cl. 158, 165, supra, is again pertinent. It was held therein that a party seeking documents or information by means of a subpoena duces tecum cannot compel the party on whom the subpoena is served

> "to go through a mass of papers and select those which in his [the witness's] judgment relate to the subject of litigation; *neither can he cast on the witness the responsibility of say-*

ing what papers do, and what papers do not, bear upon the issue to be tried" (italics ours).

In Rawlins v. Hall-Epps Clothing Co. (5th C.C.A., 1914), 217 Fed. 884, the court had before it orders for examination of the bankrupts and in disapproving of the scope of the orders, said (p. 887):

"They are required, by its terms, to determine at their peril what books of account and other writings and memoranda are material to the ascertainment of any of the matters mentioned in the order and to be covered in the examination.

We think this was requiring too much of the bankrupts. They should have been apprised by the order [17] itself what specific books, writings, and memoranda they were required to produce."

See also:

Mobile Gas Co. v. Patterson (D.C., Ala., 1923) 288 Fed. 884, 886.

(4) The subpoena duces tecum is objectionable because there is no showing by the subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider.

As said by Mr. Justice Holmes, in Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298,

a case involving an attempt to compel disclosure of records to the Federal Trade Commission in a Sherman Act proceeding (p. 306):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d. ed., sec. 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable." Essgee Co. v. United States, 262 U.S. 151, 156, 157. A general subpoena in the form of these petitions would be bad."

In Carpenter v. Winn (1911), 221 U.S. 533, a grand jury case, the court said, with reference to bills of discovery, that such a bill (p. 540):

> " * * * cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill,' and will be dismissed. * * * Such a bill must seek only evidence which is *material* to the support of the complainant's

own case, and prying into the nature of his adversary's case will not be tolerated" (italics ours). [18]

The same idea was expressed by Mr. Justice Cardozo, when on the Court of Appeals, in People v. Supreme Court (N.Y., 1927), 156 N.E. 84, wherein he said (p. 85):

"Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. Documents to be subject to inspection must be *evidence* themselves" (citing cases) (italics ours).

See, generally:

Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298, 305 (supra);

United States v. Terminal R. Ass'n. (C.C., Mo., 1907), 154 Fed. 268, collecting cases;

Third Nat. Bank & Trust Co. v. United States (6th C.C.A., 1931), 53 F. (2d) 599;

United States v. Aluminum Co. of America (D.C. N.Y., 1939), 26 F. Supp. 711.

(5) The subpoena duces tecum is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate transactions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the scope of any subpoena issued in connection with its investigation.

In Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, supra, the court said (p. 307):

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. Wallace, 258 U.S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

To the same effect, see Federal Trade Commission v. Smith (D.C., N.Y., 1929), 34 F. (2d) 323, 324. [19].

(6) Enforcement of subpoena duces tecum for testimonial purposes, without any showing of the materiality of the documents sought to be produced and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment.

A corporation may, of course, be compelled by *due and lawful process* to produce its books and papers; if the requirements, however, of a subpoena duces tecum requiring such production are not confined "*within limits which reason imposes in the circumstances of the case,*" it is not "due and lawful" in that the constitutional guaranty against unreasonable search is thereby violated.

The unlimited and unreasonable requirements of the process here involved have been hereinbefore pointed out. It specifies no particular paper but requires an indiscriminate search through the corporation's records, relevant or irrelevant, in the hope that something will turn up.

In a case cited with approval in Hale v. Henkel, 201 U.S. 43, the Supreme Court of Missouri said:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness * * * without reference to any particular offense which is the subject of inquiry, what he knows touching th violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Ex Parte Brown, 72 Mo. 83, 94. [20]

See, also:

Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, 306;

Bank of America v. Douglas (D.C., App.), 105 F. (2d) 100, 106-107;

Go-Bart Co. v. United States, 282 U.S. 344, 356-357.

(7) Enforcement of said subpoena would result in the taking of property of the moving party without compensation and without due process of law, contrary to the Fifth Amendment.

Dated: San Francisco, California, November —, 1939.

Respectfully submitted,

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for A. H. Brawner, individually and as Officer and Director of W. P. Fuller & Company, and for W. P. Fuller & Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,
Of Counsel.

(Here follows a copy of the subpoena duces tecum.)

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [21]

In the District Court of the United States of America for the Northern District of California, Southern Division.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director, W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal

of said Court on November 2, 1939, directed to Eugene Palmuth, President Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH SUBPOENAS DUCES TECUM. [22]

SUMMARY OF POINTS AND AUTHORITIES

1. The Subpoena herein is reasonable and proper and is not unduly oppressive, and, in numerous instances, the Federal Courts have upheld Subpoenas Duces Tecum which were much broader in scope.

   Brown v. United States, 276 U. S. 134 (1928)

   Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908)

   Nelson v. United States, 201 U. S. 92 (1906)

   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y., 1939)

   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)

   In re The Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

   Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)

2. An officer of a corporation served with a Subpoena Duces Tecum to produce books and rec-

ords of the corporation cannot refuse to produce the records upon the grounds that the documents produced would tend to incriminate the corporation or himself.

Essgee Company v. United States, 262 U. S. 151 (1923)
Dreier v. United States, 221 U. S. 394 (1911)
Wilson v. United States, 221 U.S. 361 (1911)
Wheeler v. United States, 226 U. S. 478 (1913)
Grant and Burlingame v. United States, 227 U.S. 74 (1913)

3. The Subpoena Duces Tecum herein questioned does not constitute an unreasonable search and seizure in violation of the Fourth Amendment, nor deprivation of property without due process of law within the meaning of the Fifth Amendment.

Nelson v. United States, 201 U. S. 92 (1906)
Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908) [23]
Norcross v. United States, 209 Fed. 13, (C. C. A. 9, 1913)
In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y. 1939)
In re Petition of the Borden Company (an unreported opinion, D. C. N.D. Ill., 1938)
Essgee Company v. United States, 262 U. S. 151 (1923)

4. The use of the term "relating to" is sufficiently definite to enable the parties subpoenaed to determine what documents are called for. It is not necessary that each document, book, record, memorandum or paper be separately and individually described, provided that such subjects and subject matters are specifically enumerated and described and there is proper limitation as to the period of time which the documents called for are to cover.

   Brown v. United States, 276 U.S. 134 (1928)
   Nelson v. United States, 201 U.S. 92 (1906)
   Consolidated Rendering Company v. Vermont, 207 U.S. 541 (1908)
   Noreross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. D.S. N.Y. 1939)
   In re Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

5. One Subpoenaed Duces Tecum in connection with a grand jury investigation under the anti-trust laws has no standing to challenge the grand jury's jurisdiction and cannot refuse to produce called-for documents on the grounds that some

of the transactions to which they relate are of an intrastate character.

Blair v. United States, 250 U.S. 273 (1919)
In re Medical Association, Chicago, Illinois, 26 Fed. Supp. 58, (D.C. D.C. 1938) [24]

6. Where Subpoenas Duces Tecum are issued to compel the production of documentary evidence before a grand jury, no showing as to relevancy and materiality of such evidence is required prior to the issuance of such subpoenas, or apart from the Duces Tecum clause therein contained. The materiality of evidence sought to be secured by Subpoenas Duces Tecum is a matter for determination not by those who may be subpoenaed, but the court in the light of the nature of the investigation, and with the widest latitude permitted to the Government.

Nelson v. United States, 201 U. S. 92 (1906)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
In re Subpoenas Duces Tecum, 248 Fed. 137 (D.C. E.D. Tenn. S.D. 1916)
In re Black, 47 Fed. (2d) 542 (C.C.A. 2d, 1931)
Brown v. United States, 276 U. S. 134 (1928)
Blair v. United States, 250 U. S. 273 (1919)
Wilson v. United States, 221 U.S. 361 (1911)

7. Not a single case cited by movants in support of their motions to quash involved grand jury

investigations. Thus they are not authority in support of the present motions.

(a) The cases relied upon by movants and the type of proceedings involved therein are as follows:

Elting v. United States, 27 Ct. Cl. 158, 165 (Court of Claims)

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298 (1924) (Federal Trade Commission)

Rawlins v. Hall Epp Clothing Company, 217 Fed. 884 (C.C.A. 5, 1914) (Bankruptcy)

Mobile Gas Company v. Patterson, 280 Fed. 884, 886 (D.C. Ala., 1923) (Bankruptcy)

Carpenter v. Winn, 221 U. S. 533 (1911) (Equity)

United States v. Terminal R. R. Association, 154 Fed. 268 (C.C. Mo., 1907) (Equity)

Third National Bank & Trust Company v. United States, 53 Fed. (2d) 599 (C.C.A. 6, 1931) (Equity) [25]

United States v. Aluminum Company of America, 26 F. Supp. 711 (D.C. S.D. N.Y. 1939) (Equity)

Federal Trade Commission v. Smith, 34 Fed. (2d) 323, 324 (D.C. N.Y. 1929) (Federal Trade Commission)

Go-Bart Company v. United States, 282 U.S. 344, 356-357 (1931) (Civil action for an injunction against use of evidence obtained on search warrant)

Bank of America v. Douglas, 105 Fed. (2d) 100, 106-107 (App. D.C. 1939) (Securities Exchange Commission)

Murray v. Louisiana, 163 U. S. 101, 107 (1890) (Action at law to Quash an Indictment)

People v. Supreme Court, 156 N. E. 84 (N.Y. 1927) (Action at law to compel production of evidence)

(b) The case of Carpenter v. Winn, 221 U. S. 533 (1911) which movants on page 5 of their memoranda of points and authorities in support of motions to quash expressly state was a grand jury case, did not involve a grand jury investigation. The nature of that case was set forth by the court in its opinion (p. 537):

> "The question is whether under Section 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection by his adversary."

Respectfully submitted,

JAMES V. HAYES
MORRIS R. CLARK
JOHN V. LEDDY
SAM E. NEEL
ROBERT DILLER
GEORGE F. FISHER, JR.

Special Assistants to the Attorney General.

[Endorsed]: Filed Nov. 9, 1939. [26]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure, District Judge.

No. 2679

(Miscellaneous)

In the Matter of the Motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, officer and director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash Subpoenas Duces Tecum to appear before the United States Grand Jury, July 1939 term of this Court.

The motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, Officer & Director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash subpoenas duces tecum to appear before the United States Grand Jury, July 1939 term of this Court, came on regularly this day for hearing. Felix T. Smith,

Esq., and Chalmers G. Graham, Esq., appearing as attorneys for the moving parties, and James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, appearing upon behalf of the United States.

The various motions were argued by Mr. Smith and Mr. Hayes and submitted to the Court for consideration and decision. Now, after due consideration had thereon, it is ordered that each of said motions to quash be and the same are hereby denied, and to which ruling the moving parties were allowed an exception.

Mr. Smith thereupon gave oral Notice of Appeal upon behalf of each of the moving parties. Mr. Smith moved the Court to grant a stay of execution herein. After hearing Mr. Smith and Mr. Hayes, it is ordered that each of the moving parties be allowed until November 13, 1939, within which time to prepare, serve and file their appeal papers.

[27]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: HON. A. F. ST. SURE, Judge.

No. 2679—Misc.

In the Matter of the Petitions of LLOYD N. COBBLEDICK, Vice-President of Cobbledick-Kibbe Glass Company, A. H. BRAWNER, Vice-President and Director W. P. Fuller & Co., and EUGENE PALMUTH, President Crowe Glass Company, to Quash Subpoenaes Duces Tecum to Appear Before U. S. Grand Jury July, 1939 Term of this Court.

TESTIMONY

Friday, November 10, 1939.

Counsel Appearing:

For the United States: James V. Hayes, Esq. and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States.

For the Petitioners: Felix T. Smith, Esq., Chalmers G. Graham, Esq., Henry G. Hayes, Esq.

Mr. Henry G. Hayes: As your Honor knows, yesterday the motions to quash subpoenaes duces tecum before the Grand Jury were argued and were denied.

The Court: Yes.

Mr. Henry G. Hayes: At that time Mr. Smith gave notice of appeal, and asked for a stay, and your Honor was uncertain as to whether your Honor had jurisdiction to enlarge the time for appearance before the Grand Jury. As you know, Mr. Felix Smith wrote you a letter, of which a copy has been handed to counsel for the Government, submitting authorities——

The Court: I haven't seen the letter. It is probably on my desk. [28]

Mr. James V. Hayes: Here is a copy supplied to the Government, your Honor.

The Court: In the letter Mr. Smith says he admits the Court has the power to make an appropriate order to preserve the status quo. What do you wish to say about it? The only question is whether or not the Court will make the order.

Mr. Henry G. Hayes: Well, it is a matter for the Court, your Honor, but our feeling is that an appearance by the witnesses to-day would, in reality, be an appearance pending the appeal.

The Court: I don't know whether I would want to make any order at all. It would depend on what the Government thinks about the matter. In other words, if the Government is prepared to go ahead with the witnesses, the Grand Jury is in session, and I might conclude the hearing should go ahead.

Mr. Henry G. Hayes: Despite the pendency of the appeal, your Honor? I would say that makes the appeal valueless.

The Court: I don't think there is anything in the point that Mr. Smith makes at this time.

Mr. Henry G. Hayes: Well, we, of course, feel, first, your Honor, that if we ask——

The Court: I understand. I believe you are acting in good faith in the matter.

Mr. Henry G. Hayes: I might suggest, your Honor, as Mr. Smith did in his letter, I believe, that in the Grand Jury case down South an enlargement of time in the District Court was obtained by stipulation of counsel, and when the case got up into the Circuit Court of Appeals the time was enlarged in the Circuit Court. [29]

The Court: I don't know how the Government feels about the matter. Do you want to continue with the proceedings?

Mr. James V. Hayes: Yes, your Honor. The Grand Jury is presently waiting for us to appear before it.

The Court: Well, you have looked into the case, have you?

Mr. James V. Hayes: Yes, we have, your Honor. The law, as we see it, first of all the cases cited by counsel do not have anything to do with any duty on the Court——

The Court: No, I think the Court——

Mr. James V. Hayes: We don't believe there is any question in regard to the Court's power to control the Grand Jury.

The Court: I think I could do that. The only thought I had was whether or not I wanted to continue the matter, hold up further proceedings before the Grand Jury, whether or not I would have the power to do that.

Mr. Henry G. Hayes: Your Honor, as I recall, counsel will check me, I think, that you made a suggestion yesterday of continuing the matter until Monday if you felt you had the jurisdiction to do that.

The Court: Well, I did not—all I said to Mr. Smith was to take his appeal, and he promised me he would do that.

Mr. Henry G. Hayes: Yes; that was filed this morning, your Honor.

The Court: And that has been attended to. I can't see any good reason to hold up the proceedings of the Grand Jury.

(After discussion a recess was taken until 11:30 A. M.)

The Court: Well, gentlemen, is there anything further you wish to say to the Court about this matter?

Mr. Felix Smith: Well, your Honor, our position is that we [30] have a serious question, and a very difficult question. As a matter of fact, if your Honor should order these witnesses to produce these documents I would have the gravest difficulty, myself, in

telling them what they ought to produce, in that it is impossible to tell from this subpoena what the duties of the witness are. We think that is a serious matter, and we should be allowed to present it to the Circuit Court of Appeals. I realize your Honor does not sympathize with our view, but I think we should be permitted to present that matter to the Court in the regular way.

Now, if your Honor does not wish to make a stay, of course, that is within your Honor's discretion, but I think your Honor ought to permit us to make an application to the Circuit Court of Appeals for a stay.

The Court: Well, how much time do your want for that?

Mr. Smith: Well, I believe that will have to rest within the judgment of the Circuit Court of Appeals. I can go into the Circuit Court of Appeals and try to see the Presiding Justice this morning. I don't know whether he is even in town. I could confer with him this morning. I think he should have very definite ideas about when the Court could hear a motion of that kind.

The Court: It would seem now that it would be a mistake for this Court to hold up the proceedings of the Grand Jury until your appeal is decided.

Mr. Smith: I realize that is the attitude your Honor has. As I say, I would want to expedite the appeal, but I think that, holding your Honor's view, your Honor still would feel that it was the proper

thing to allow sufficient time to make an application to the Circuit Court of Appeals.

The Court: Yes. I am wondering how much time would be [31] necessary for you to do that. It is almost twelve o'clock now, twenty-five minutes to twelve.

Mr. Smith: Yes.

The Court: Tomorrow is a legal holiday, it is a national holiday, and then comes Sunday. I wonder how long——

Mr. Smith: It might be the Circuit Court of Appeals in an application of this kind would hear it Monday morning. I assume that counsel for the United States would co-operate with us in having a matter of that kind taken up promptly?

The Court: Yes. Perhaps it would be well if the United States Attorney and you and myself go and see the Senior Circuit Judge of the Court of Appeals.

Mr. Smith: I hate to impose upon your Honor that way, but that would, I think——

The Court: Oh, no, no.

Mr. Smith (Continuing) —be the most expeditious way of attending to the matter.

The Court: We may impress upon the Court the necessity of hearing the matter at an early date. Do you see any objection to that?

Mr. James V. Hayes: I see no objection to it, your Honor, if such an application should be made to the Circuit Court of Appeals to-day, but I would

freely consent to an adjournment of the subpoenaes if I believed there was any merit in the argument advanced. Convinced, as I am, that there is no merit in it, and with the Grand Jury actually sitting, waiting for the witnesses, and seeking to conclude its investigation, and feeling that this is an effort to secure further delay, I don't feel I can, in conformance with my duty in the circumstances, make any consent which would require a longer delay than certainly Monday.

The Court: Well, I wouldn't ask any consent. I wouldn't ask [32] you to consent, but I am wondering what the best thing to do under the circumstances would be. We can see Judge Wilbur at this time and ask him if he can take it up on Monday.

Mr. Smith: Shall I see if he is there, your Honor?

The Court: I say, we can go and see him.

Mr. Smith: I see, your Honor.

(After recess:)

The Court: Since we conferred with Judge Wilbur I take it, gentlemen, that there will be no objection to the Court's adjourning the subpoenaes before the Grand Jury until next Wednesday morning at ten o'clock.

Mr. James V. Hayes: That is correct, your Honor.

The Court: Is there anything further you wish to say?

Mr. James V. Hayes: Except this, that that agreement by the Government was on the condition that counsel submit a brief and record to the Circuit

Court on Monday and ask for a hearing on the merits. The Government will have its brief ready at the same time.

The Court: Mr. Smith, you desire a hearing at the earliest time, do you not?

Mr. Smith: Yes, your Honor. It will have to be a typewritten brief and transcript.

The Court: Yes. I think there will be no question about the Court permitting you to proceed that way, in so far as the record is concerned.

Mr. Smith: Your Honor, I will have a typewritten transcript and brief ready Monday.

Mr. James V. Hayes: The Government will be ready with its brief on Monday.

Mr. Smith: May I suggest the record in the Circuit Court of Appeals will be better if the Court makes an order denying [33] my motion to stay the proceedings under the three subpoenaes duces tecum and continue the return date on the subpoenaes until Wednesday morning.

The Court: Motion is denied and an exception noted. [34]

CERTIFICATE OF OFFICIAL PHONOGRAPHIC REPORTER

State of California,
City and County of San Francisco—ss.

I, Kenneth G. Gagan, hereby certify that I am an official shorthand reporter of the United States District Court for the Northern District of California,

and that as such reporter I took down in shorthand writing on the 10th day of November, 1939, the proceedings had in the matter entitled in the caption hereof, fully, truly and correctly, to the best of my ability; that I thereafter caused my said shorthand writing to be transcribed into typewriting, and that the foregoing 7 pages constitute said transcript; that the same is a full, true and correct transcription of my said shorthand notes aforesaid, and is a full, true, accurate and correct transcription of said proceedings in said matter.

Dated, San Francisco, Calif., November 10, 1939.

KENNETH G. GAGAN,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 10, 1939. [35]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

In this matter Felix T. Smith, Esq., Attorney for the moving parties herein, moved the Court to stay proceedings on Subpoenas Duces Tecum issued to—

Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co.,
A. H. Brawner, Officer & Director of W. P. Fuller & Co., and
Eugene Palmuth, President of Crowe Glass Co.,

requiring them, and each of them, to appear before the United States Grand Jury, July 1939 Term of this Court.

After hearing Mr. Smith and James V. Hayes, Esq., Special Assistant to the Attorney General, in opposition thereto, It Is Ordered that said motion be and the same is hereby Denied. The moving parties were allowed an exception to the ruling of the Court.

Further ordered that the return day of each subpoena be extended until Wednesday, November 15, 1939, at 10 o'clock a. m. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL [37]

Notice is hereby given that A. H. Brawner, individually, A. H. Brawner, Officer and Director, W. P. Fuller & Co., a California corporation, and W. P. Fuller & Co., a California corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Northern District of California, Southern Division, made Novem-

ber 9, 1939, denying the motion of A. H. Brawner, individually, and as Officer and Director of W. P. Fuller & Co., a California corporation, and of said W. P. Fuller & Co., a California corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said A. H. Brawner, Officer and Director, W. P. Fuller & Company, issued out of and under the seal of said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939.

Dated: San Francisco, California, November 9, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco, California.
Telephone: Garfield 8700.
FELIX T. SMITH
Standard Oil Building,
San Francisco, California.
Telephone: Garfield 6133.
Attorneys for A. H. Brawner, individually, A. H. Brawner, Officer and Director of W. P. Fuller & Co., and W. P. Fuller & Co.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco, California.
CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco.
Of Counsel.

[Endorsed]: Filed Nov. 10, 1939. [38]

BOND

Know All Men By These Presents:

That we, A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation organized and existing under and by virtue of the laws of the State of California, having an office and place of business at 301 Mission Street, City and County of San Francisco, California, and said W. P. Fuller & Co., a corporation, as aforesaid, as principals, and Pacific Indemnity Company, duly authorized to transact a surety business, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 9th day of November, 1939.

Whereas said A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and said W. P. Fuller & Co., a corporation, have this day appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said District Court of the United States for the Northern District of California, Southern Division, made November 9, 1939, denying the motion of A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and of said W. P. Fuller & Co., a corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said A. H. Brawner, officer and director, W. P. Fuller & Company, issued out of and under the seal of said District Court of the United States, under date of November [39] 2, 1939, which said order was entered on or about November 9, 1939;

Now the condition of the above obligation is such that if A. H. Brawner, individually, and as officer and director of said W. P. Fuller & Co., and said W. P. Fuller & Co., shall pay all damages and costs, if said appeal is dismissed, or said order is affirmed, or such cost as said Circuit Court of Appeals may award if said order is modified, then this obligation to be void; else to remain in full force and virtue.

It is further expressly understood and agreed that in case of a breach of any condition of the above obligation, the court in the above entitled matter may, upon notice to the Pacific Indemnity Company, of not less than ten (10) days, proceed summarily in said matter to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

[Seal] A. H. BRAWNER,
A. H. Brawner, individually

[Seal] A. H. BRAWNER,
A. H. Brawner, Officer and Director, W. P. Fuller & Co., a corporation

[Seal] W. P. FULLER & CO.,
By A. H. BRAWNER,
Treasurer

[Seal] PACIFIC INDEMNITY COMPANY,
By R. R. POULTON,
Attorney in fact [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November in the year one thousand nine hundred and thirty-nine, before me, Emily K. McCorry, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. R. Poul-

ton, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY
Notary Public in and for City and County of San Francisco, State of California.

My commission expires December 30, 1942. [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November, 1939, before me, Frank L. Owen, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared A. H. Brawner, known to me to be the person who subscribed to the foregoing bond, individually and as officer and director of W. P. Fuller & Co., and known to me to be an officer and director of W. P. Fuller & Co., and known to me to be the treasurer of W. P. Fuller & Co., the corporation described in and that executed the within instrument, and also known to me to be the person who executed it for

and on behalf of the corporation therein named, and he acknowledged to me that he executed the foregoing instrument individually and as officer and director of W. P. Fuller & Co., and that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county and state aforesaid the day and year in this certificate first above written.

[Seal] FRANK L. OWEN
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 10, 1939. [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the United States of America, and James V. Hayes and Morris R. Clark, special assistants to the Attorney General, its attorneys:

You are hereby advised that there has been this day filed in the above entitled matter notice of appeal and bond on appeal by A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and by said W. P. Fuller & Co., a corporation, from the order of the Honorable A. F. St. Sure, District Judge, made and entered in the above entitled matter on November 9, 1939,

and that said appellants designate the entire record in said proceeding, including the following papers:

1. Petition for and order filed with the clerk of said court on or about the ..... day of ....., 1939, directing the issuance of subpoena duces tecum, addressed to A. H. Brawner, officer and director, W. P. Fuller & Co. 301 Mission Street, San Francisco, California;

2. Subpoena duces tecum issued on November 2, 1939, addressed to said A. H. Brawner, officer and director, W. P. Fuller & Co., 301 Mission Street, San Francisco, California;

3. Return showing service of said subpoena duces tecum on said A. H. Brawner, officer and director, W. P. Fuller & Co., 301 Mission Street, San Francisco, California;

4. Motion and notice of motion of said A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and of said W. P. Fuller & Co., a corporation, to quash said subpoena duces tecum, said notice being dated November 7, 1939, together with the affidavit of A. H. Brawner in support thereof, and copy of said subpoena duces tecum; and memoranda of points and authorities;

5. Order shortening time for the service of said notice of motion to quash subpoena duces tecum, dated November 8, 1939;

6. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and

entered on or about November 9, 1939, denying said motion to quash; [43]

7. Notice of appeal from said order denying said motion to quash, dated November 10, 1939, and filed November 10, 1939, together with bond on appeal in the sum of two hundred and fifty dollars ($250);

8. Order of the above entitled court, made by the Honorable A. F. St. Sure, Judge thereof, and entered on November 10, 1939, denying a motion to stay the proceedings under said subpoena duces tecum pending the appeal;

9. Reporter's transcript of the proceedings at the hearing on November 10, 1939, at which the oral motion for a stay pending appeal was denied by the Honorable A. F. St. Sure, Judge of said District Court.

Dated: San Francisco, California, November 10, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco
FELIX T. SMITH
Standard Oil Building,
San Francisco
Attorneys for A. H. Brawner, individually, and as Officer and Director of W. P. Fuller & Co., and for W. P. Fuller & Co.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

(Admission of Service)

[Endorsed]: Filed Nov. 10, 1939. [44]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the motion of A. H. Brawner, etc. et al to quash grand jury subpoena No. 2679, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.55 and that the said amount

has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of November A. D. 1939.

[Seal] WALTER B. MALING
Clerk

J. P. WELSH
Deputy Clerk. [45]

[Endorsed]: No. 9363. United States Circuit Court of Appeals for the Ninth Circuit. A. H. Brawner, Individually and as Officer and Director of W. P. Fuller & Co., and W. P. Fuller & Co., a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 13, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. H. BRAWNER, Individually and as Officer and Director of W. P. Fuller & Co., and W. P. FULLER & CO., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR STAY OF PROCEEDINGS ON SUBPOENA DUCES TECUM PENDING APPEAL AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.

To the United States of America, and to Messrs. James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, its attorneys:

You and each of you will please take notice that A. H. Brawner, individually and as officer and director of W. P. Fuller & Co., a corporation, and W. P. Fuller & Co., a corporation, appellants in the above entitled matter, will, on Monday, the 13th day of November, 1939, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, apply to the above entitled court at its courtroom in the Post-Office Building, in the City and County of San Francisco, State of California, for an order staying the operation of the subpoena duces tecum involved in said appeal pending the determination of said appeal or the further order of this court.

Said motion will be made upon the ground that such order is necessary in order to preserve the status quo pending said appeal.

Said motion will be based upon the records, papers and files in the above entitled matter and on the memorandum of points and authorities attached hereto.

Dated: November 13, 1939.

CHALMERS G. GRAHAM
FELIX T. SMITH
Attorneys for A. H. Brawner, individually and as officer and director of W. P. Fuller & Co., a corporation, and for W. P. Fuller & Co., a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

Memorandum of Points and Authorities

Rule 62 (g) of the Rules of Civil Procedure;

Janssen v. Belding-Corticelli (3d C. C. A.), 79 F. (2d) 828;

G. M. Foster, individually, et seq., et al. Appellants, v. United States of America, Appellee, No. 9287 (9th C. C. A.). Order dated September 20, 1939;

In re Cudahy Packing Co. of Chicago, Ill. (2d C. C. A.), 104 F. (2d) 658.

[Endorsed]: Filed Nov. 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November 13, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTIONS AND CAUSES

Ordered motion of appellants for supersedeas pending appeals, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeals, and causes on merits argued by Mr. Felix T. Smith, counsel for appellants, and by Mr. James V. Hayes, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

At a Stated Term, to wit: The October Term A. D. 1939, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the 27th day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

Honorable William Denman, Circuit Judge, Presiding,
Honorable Clifton Mathews, Circuit Judge,
Honorable William Healy, Circuit Judge.

No. 9362

EUGENE PALMUTH, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9363

A. H. BRAWNER, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9364

LLOYD N. COBBLEDICK, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER STAYING PROCEEDINGS ON SUBPOENAS DUCES TECUM.

Good cause therefor appearing, and by direction of the Court, It Is Ordered that the operation of the subpoena duces tecum involved in each of the appeals herein be, and each of said subpoenas duces tecum, hereby is stayed until the further order of this Court.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 28, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Causes.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes—Nos. 9362, 9363, 9364.]

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before Denman, Mathews and Healy, Circuit Judges:

Mathews, Circuit Judge:

These appeals are from orders denying motions to quash subpoenas duces tecum issued out of the District Court of the United States for the Northern District of California. The subpoenas were issued on November 2, 1939, and were directed to (1) Eugene Palmuth, president of Crowe Glass Company, (2) A. H. Brawner, officer and director of W. P. Fuller & Company, and (3) Lloyd N. Cobbledick, vice-president of Cobbledick-Kibbe Glass Company. Thereby each of the persons named was commanded to appear before the court on November 10, 1939, to testify and give evidence before the grand jury, and to bring with him certain letters, telegrams, correspondence, memoranda and other communications exchanged by or passing between the company of which he was an officer and one Sam Goodman.

On November 8, 1939, motions to quash the subpoenas were filed by Palmuth and Crowe Glass Company, Brawner and W. P. Fuller & Company,

and Cobbledick and Cobbledick-Kibbe Glass Company, respectively. The motions were denied and notices of appeal were filed on November 9, 1939.

In each of these cases, appellants' brief states: "The jurisdiction of this Court exists by virtue of section 225(a), title 28, of the United States Code Annotated." Section 225(a) provides that the circuit courts of appeals shall have appellate jurisdiction to review by appeal "final decisions" in the district courts in all cases save where a direct review of the decision may be had in the Supreme Court under §345 of title 28.[2] The orders here appealed from are not "final decisions," within the meaning of §225(a), and are not appealable.

The contrary holding, In re Cudahy Packing Co., 2 Cir., 104 F. 2d 658, is clearly erroneous. That holding finds no support in Perlman v. United States, 247 U. S. 7, or in Go-Bart Importing Co. v. United States, 282 U. S. 344. No subpoena was involved in either of those cases. In each of them, the appeal was from an order denying an application for the return of papers belonging to the applicant and alleged to have been wrongfully seized or impounded, and to enjoin the use thereof as evidence. Such an order is, in effect, a judgment or decree dismissing a suit or proceeding for the recovery of property.

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1. Judicial Code, §128(a), 52 Stat. 779.
2. Judicial Code, §238, 43 Stat. 938.

Between such an order and the orders here appealed from, there is no pertinent similarity. Appellants' papers have not been seized or impounded. Appellants have not brought or had occasion to bring any suit or proceeding to recover their papers. The denial of motions to quash the subpoenas was not a dismissal of any suit or proceeding. Appellants may, notwithstanding such denial, disregard the subpoenas and, if prosecuted for contempt, may again challenge their validity—thus, in effect, renewing the motions to quash—and, if convicted, may appeal. Upon such appeals, and not otherwise, the denial of the motions may be reviewed by this court.

Even where, after indictment and before trial, the defendant in a criminal case applies for an order requiring Government counsel to return papers taken from the defendant without a warrant, and for the suppression of evidence obtained therefrom, an order denying the application is not a final decision and, therefore, is not independently appealable, but is reviewable only upon appeal from a judgment of conviction. Cogen v. United States, 278 U. S. 221.

We have no reason to suppose that the Supreme Court would have ruled differently if, instead of a seizure of Cogen's papers, there had been a subpoena requiring him to produce them, and a motion by Cogen to quash the subpoena had been denied: or if, as in the cases at bar, such subpoena had been

issued in an inquisitorial proceeding before a grand jury. If an appeal were permissible in either case, the practical consequences with respect to the orderly administration of justice would be equally disastrous; and in determining whether these orders are final, in the sense in which that term is used in the governing statute, practical considerations, such as the existence of other available methods of review, and the delays attendant upon permitting direct appeals to be taken, should not be ignored.

Appeals dismissed.

[Endorsed]: Filed November 28, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9363.

A. H. BRAWNER, individually and as officer and director of W. P. Fuller & Co., a corporation, and W. P. FULLER & CO., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellants for supersedeas pending appeal, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeal, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

[Endorsed]: Filed and entered Nov. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-six (66) pages, numbered from and including 1 to and including 66, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.